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CPLR 3216: Forty-Five Day Demand Held Condition Precedent to a 3216 Motion

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discontinued. When plaintiff subsequently brought suit in a second court on the same cause of action, defendant moved to dismiss on the ground of the "pendency" of the prior action.[156] The court equated the withdrawal of the moving papers to the situation which results after the service of a summons without a complaint, and held that since the summary judgment motion was not *denied* in the first action, the affidavit did not become the complaint.[157]

The main problem in the instant case was whether the stipulated withdrawal served to effectively terminate the first cause of action. If so, the second action could proceed directly to judgment. The court found that the summons from the first action was still outstanding, and stayed its own action pending disposition of the prior litigation. However, it did not decide whether an outstanding summons was sufficient to constitute a prior pending action under CPLR 3211(a)(4).

It has been held, for the purposes of CPLR 3211(a)(4), that a summons alone will not bar future proceedings "as the party might, in his declaration, count upon an entirely different cause of action." [158] However, this reasoning may not be applicable to the situation presented in the instant case. Here, the court could examine the moving papers from the first action to determine whether the two actions were identical. If so, the court might dismiss the second action on the basis of a prior pending action. If not, the court would order that the second action proceed to judgment.

Pursuant to the disposition here, plaintiff can move in the original court for a voluntary discontinuance[159] or other clarification of the first action's status. If it is determined that the first action is no longer pending, plaintiff can bring that clarification to the attention of the second court, move to vacate the latter's stay, and proceed with the second action.

CPLR 3216: Forty-five day demand held condition precedent to a 3216 motion.

The controversy revolving about the forty-five day notice requirement of the 1964 amendment to CPLR 3216 appears finally to have been resolved. In *Salama v. Cohen,*[160] a memorandum

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[156] CPLR 3211(a)(4).

[157] Reiche v. Schuster, 47 Misc. 2d 782, 783, 263 N.Y.S.2d 287, 288 (Dist. Ct. Nassau County 1965).

[158] Louis R. Shapiro, Inc. v. Milspemes Corp., 20 App. Div. 2d 857, 248 N.Y.S.2d 85, 87 (1st Dep't 1964) (memorandum decision); see 7B McKINNEY'S CPLR 3211, supp. commentary 96, 97 (1964).

[159] CPLR 3217. It is not clear, however, if plaintiff could discontinue the first action by mere notice to the defendant (CPLR 3217(a)(1)) or whether he was required to obtain a court order for discontinuance (CPLR 3217(b)). This would depend upon whether plaintiff had (by way of the since withdrawn moving papers) asserted a claim in the first action, which question was not resolved by the instant case.

[160] 154 N.Y.L.J., Dec. 3, 1965, p. 16, col. 1.

opinion, the New York Court of Appeals unanimously held that before a 3216 motion to dismiss will be considered, defendant must first serve a written demand upon plaintiff to serve and file a note of issue within forty-five days. Although this would seem necessarily to mean that all plaintiffs are now entitled to a forty-five day grace period in which to revive a stagnant claim, practitioners in the first department are cautioned against assuming that plaintiff's rights are so protected. Previous attempts, by both the legislature and the Court of Appeals, to provide safeguards against neglect-to-prosecute dismissals, have not had, at least in the first department, the pervasive effect that many assumed they would. Developments of the past might shed some light on the future of CPLR 3216.

The attention that has been drawn to the dismissal for neglect to prosecute was originated by the first department in *Sortino v. Fisher*.[161] Disturbed by the overburdening of its calendar with stale and immobile claims, the court sought to clear away stagnant litigation by expanding the accessability of this motion to defendants. In *Sortino*, the first department carefully re-examined the excuses for delay in prosecution that plaintiffs had been successfully employing to resist defendants' motions to dismiss. It discarded some as patently insufficient and severely limited the operation of those remaining.[162] It had been previously recognized that a dismissal for failure to prosecute by the appellate division "involves a pure question of discretion of the type not reviewable by the Court of Appeals." [163] Therefore, when confronted by the flood of 3216 dismissals throughout the state following *Sortino*,[164] plaintiffs turned to the legislature for assistance. This resulted (only months after *Sortino*) in the enactment of the 1964 (Volker) amendment to CPLR 3216, which, although providing other benefits to plaintiffs, became widely renowned for its requirement of a forty-five day demand before any dismissal for failure to file a note of issue could be entertained. It was assumed that this would assure plaintiff a grace period in which, by filing a note of issue, he could avoid CPLR 3216 entirely.[165] However, in the *Mulinos*[166] and *Brown*[167]

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[161] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

[162] See 7B McKINNEY's CPLR 3216, supp. commentary 169, 170-73 (1964) for an extensive discussion and evaluation of the *Sortino* case; *A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 448-52 (1964).

[163] Miranda v. City of New York, 10 N.Y.2d 883, 179 N.E.2d 512, 223 N.Y.S.2d 509 (1961).

[164] *E.g.*, Rockwell v. Locker, 20 App. Div. 2d 722, 247 N.Y.S.2d 554 (2d Dep't 1964); Dawkins v. Mandelson, 20 App. Div. 2d 713, 247 N.Y.S.2d 348 (2d Dep't 1964).

[165] 7B McKINNEY's CPLR 3216, supp. commentary 160, 161 (1965).

[166] Mulinos v. Coliseum Constr. Corp., 22 App. Div. 2d 163, 254 N.Y.S.2d 282 (1st Dep't 1964).

[167] Brown v. Weissberg, 22 App. Div. 2d 282, 254 N.Y.S.2d 628 (1st Dep't 1964).

cases, the first department clearly indicated that it would not be so easily deterred from the strict policy toward lethargic plaintiffs it had so carefully outlined in *Sortino*. The court in *Mulinos* held that by relying for dismissal upon "general delay" (apparently delay in the performance of those acts required preparatory to filing a note of issue), rather than failure to file, defendant would not have to serve a forty-five day demand.[168] The Court of Appeals reversed this "general delay" dismissal on the ground that the appellate division lacked the power to dismiss for failure to file a note of issue unless CPLR 3216, as amended, was complied with.[169] The brevity and ambiguity of the opinion, however, enabled the first department to find that this case was consistent with its prior holdings.[170]

The second department, which prior to the amendment had followed *Sortino*,[171] tacitly indicated its opposition to the construction of the first department,[172] and a few lower courts in the second department have specifically and emphatically registered their dissent.[173] The fourth department has been silent on the issue and one trial court in the third department has adopted the first department's view.[174]

Although *Salama* would seem to terminate all dispute, its language, by a hypertechnical reading, permits one possible avenue of avoidance. That is, after the forty-five day period has lapsed, defendant might still move for dismissal based on general delay, notwithstanding plaintiff's filing of a note of issue within that period. However unlikely such a construction would be, the practitioner should at least be aware of its possible occurrence.

Were it not for the fact that the first department's construction of CPLR 3216 appears to be contrary to that of the Court of Appeals, and opposed to the intent of the legislature in amending this rule, the position taken by the first department would have much substantive merit. Even were plaintiff not entitled to the

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[168] Mulinos v. Coliseum Constr. Corp., *supra* note 166, at 164, 254 N.Y.S.2d at 283; see Weeks v. Janowitz, 23 App. Div. 2d 549, 256 N.Y.S.2d 341 (1st Dep't 1965); Rutigliano v. Richter, 23 App. Div. 2d 489, 255 N.Y.S.2d 741 (1st Dep't 1965).

[169] Fischer v. Pan Am. World Airways, Inc., 16 N.Y.2d 725, 209 N.E.2d 725, 262 N.Y.S.2d 108 (1965).

[170] Roberts v. New York Post Corp., (1st Dep't), 154 N.Y.L.J. Oct. 1, 1965, p. 15, col. 7.

[171] See cases cited note 164 *supra*.

[172] *E.g.*, McLoughlin v. Weiss, 23 App. Div. 2d 881, 259 N.Y.S.2d 941 (2d Dep't 1965); Dooley v. Gray, 22 App. Div. 2d 791, 253 N.Y.S.2d 808 (2d Dep't 1964).

[173] See, *e.g.*, Kalning v. New York Cent. R.R., 45 Misc. 2d 1036, 258 N.Y.S.2d 743 (Sup. Ct. Queens County 1965); DeVita v. Metropolitan Dist., Inc., 45 Misc. 2d 761, 257 N.Y.S.2d 618 (Sup. Ct. Nassau County 1965).

[174] New Paltz Growers, Inc. v. Jersey Ice Mach. Co., 47 Misc. 2d 951, 263 N.Y.S.2d 472 (Sup. Ct. Ulster County 1965).

forty-five day demand, he would nevertheless be immunized from a CPLR 3216 motion during the six months subsequent to joinder by virtue of the same amendment that furnished the forty-five day demand.

There are several explanations for delay which the courts will accept to overcome the motion and a strong showing of merit may also suffice as a valid defense.[175] Pursuant to the apparent meaning of *Salama,* and the more explicit statements of a few trial courts in the second department,[176] plaintiff is encouraged to rest upon his rights for so long as he might choose—even years past the expiration of the statute of limitations—and still be entitled to forty-five days to revive his claim.

CPLR 3216: Dismissal held available against third-party plaintiff.

In *New Paltz Growers, Inc. v. Jersey Ice Mach. Co.,*[177] apparently the only reported post-amendment third department case to consider the failure-to-prosecute dismissal, the Ulster County Supreme Court granted a third-party defendant's 3216 motion to dismiss the third-party claim. The court refused to consider the motion for its application to the plaintiff's main action, stating:

> The third-party plaintiff by commencing the third-party action, interjected itself as an aggressor plaintiff party and assumed the duties and responsibilities of a plaintiff in pressing its action. It had the right to bring motions for dismissal under CPLR 3216. . . . If a delay was avoidable, it is no excuse to lay it at the door of the plaintiff in the main action. The third-party plaintiff stands on his own activity or lack of activity and must justify the delay with some reasonable excuse.[178]

The court stated (following the first department holdings alluded to above) that since the dismissal was based upon general delay, the forty-five day demand was unnecessary.

Although the *Salama* case would now seem to require the forty-five day demand, the disposition of the instant case is nonetheless difficult to justify.

Since impleader in New York is available only for indemnity, it seems inappropriate to lay the burden of prosecution on the third-party plaintiff, even as to the third-party claim. In that claim, defendant (third-party plaintiff) is seeking only to be made whole for whatever the main plaintiff recovers from him. If the main claim is delayed—and *Sortino* and its progeny provides that the

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[175] Giordano v. St. Clare's Hospital, 24 App. Div. 2d 568, 262 N.Y.S.2d 61 (2d Dep't 1965). *Contra,* New Paltz Growers, Inc. v. Jersey Ice Mach. Co., *supra* note 174.

[176] See cases cited note 173 *supra.*

[177] *Supra* note 174.

[178] New Paltz Growers, Inc. v. Jersey Ice Mach. Co., *supra* note 174, at 953, 263 N.Y.S.2d at 474.